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In the Supreme Court of the United States

No. 04-1131

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 382 F.3d 938. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. A petition for rehearing was denied on November 24, 2004 (Pet. App. 16a). The certiorari petition was filed on February 22, 2005, and was granted on June 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. *Background.* a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judg-

ment." *Id.* at 444-445 (citations omitted); accord S. Rep. No. 969, 95th Cong., 2d Sess. 63 (1978). "Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 444-445. The CSRA is the culmination of a century of legislative "consideration of the conflicting interests involved in providing job security, protecting the right[s of workers], and maintaining discipline and efficiency in the federal work force." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). The CSRA regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * *, including the availability of * * * judicial review." *Fausto*, 484 U.S. at 443.

b. In a series of enactments between 1995 and 2000, Congress revised federal personnel law applicable to the Federal Aviation Administration (FAA), an agency of the Department of Transportation (DOT).[1] In recognition of the "significant problems" that confront "the national air transportation sys-

[1] Pub. L. No. 104-50, § 347, 109 Stat. 460 (repealed by Pub. L. No. 106-181, § 307(d), 114 Stat. 126); Pub. L. No. 104-264, § 253, 110 Stat. 3237; Pub. L. No. 106-181, §§ 307(a), 308(b), 114 Stat. 124, 126.

tem," and to afford the FAA increased flexibility with personnel issues to help it fulfill its "unique" mission of "operat[ing] 24 hours a day, 365 days of the year * * * [in] a state-of-the-art industry," Pub. L. No. 104-264, § 221(1) and (14), 110 Stat. 3227-3228, Congress made certain provisions of the CSRA applicable to the FAA, but exempted the agency from other provisions. See 49 U.S.C. 40122(g)(2). In lieu of the CSRA provisions Congress made inapplicable, it directed the FAA to establish a "personnel management system * * * that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency established the FAA Personnel Management System, which closely parallels the CSRA. See, *e.g.*, FAA, *FAA Personnel Management System* (1996) <http://www. faa.gov/ahr/policy/PMS/personel.htm> (*Pers. Mgmt. Sys.*). The applicable provisions of the CSRA and the FAA Personnel Management System together comprise a hybrid personnel system that is as fully comprehensive as that created by the CSRA, covering personnel practices, adverse actions, labor relations, and employee grievances. Pet. App. 4a.

2. *The Remedial Framework of the CSRA and the FAA System.* The CSRA and the FAA Personnel Management System essentially create a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the systems provide as follows: (a) "for major personnel actions specified in the statute ('adverse actions')," both systems afford an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.); (b) for specified "personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel practices')," the systems provide administrative mechanisms to be followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for minor personnel matters

involving bargaining-unit employees, the systems provide a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, 7123; for non-bargaining unit employees, review generally is limited to a separate internal agency grievance mechanism, see, *e.g.*, *Pers. Mgmt. Sys.* Ch. III, ¶ 4.

a. *Adverse Actions.* CSRA provisions set forth in Chapters 43 and 75 of Title 5 create "an elaborate new framework for evaluating adverse personnel actions against [federal employees]." *Fausto*, 484 U.S. at 443 (quoting *Lindahl*, 470 U.S. at 774). Congress exempted the FAA from those two chapters, 49 U.S.C. 40122(g)(2), but the FAA system creates equivalent procedural protections. Both the CSRA and the FAA system require advance written notice of a proposed "major adverse action" (*i.e.*, removal, suspension for more than 14 days, reduction in grade or pay, or furlough of 30 days or less, 5 U.S.C. 7512; see 49 U.S.C. 40122(j) (also including reductions in force)), and they afford a right of representation, reasonable time to respond, and a written final decision. 5 U.S.C. 4303(b), 7503(b), 7513(b); *Pers. Mgmt. Sys.* Ch. III, ¶ 3(g)-(q). Both systems provide employees a right to appeal the agency action to (and obtain a formal hearing by) the Merit Systems Protection Board (MSPB), 5 U.S.C. 4303(e), 7513(d), 7701; 49 U.S.C. 40122(g)(3), and to seek judicial review of the MSPB's decision in the Federal Circuit, 5 U.S.C. 7703(b)(1); 49 U.S.C. 40122(g)(2)(H). Employees who have been suspended for less than 14 days (a "minor adverse action," 5 U.S.C. 7502) are not provided a right to appeal to the MSPB or to seek judicial review. See 5 U.S.C. 7503.[2]

b. *Prohibited Personnel Practices.* Chapter 23 of Title 5 "establishes the principles of the merit system of employ-

[2] The FAA system also provides employees the right to appeal a major adverse action through the FAA's "Guaranteed Fair Treatment" procedure, with a right of review in a court of appeals. *Pers. Mgmt. Sys.* Ch. III, ¶ 5(m); see 49 U.S.C. 40122(h) and (i), 46110(a) (2000 & Supp. II 2002).

ment." *Fausto*, 484 U.S. at 446. The chapter forbids agencies from engaging in specified "prohibited personnel practices," 5 U.S.C. 2302, defined broadly to include "personnel action" involving discrimination on the basis of race, color, religion, sex, national origin, handicap, or political affiliation; coercion of political activity; nepotism; retaliation against whistleblowers; and violation of any law, rule or regulation implementing or directly concerning the merit system principles set forth in 5 U.S.C. 2301, including the requirement that employees be accorded fair and equitable treatment with "proper regard for their privacy and constitutional rights."[3] 5 U.S.C. 2301(b)(2), 2302(b)(1), (2), (7), (8) and (12). Although Congress exempted the FAA from most of Chapter 23, 49 U.S.C. 40122(g)(2)(A), in its place, the FAA Personnel Management System established the agency's own list of merit principles, see *Pers. Mgmt. Sys.* Intro. ¶ VII, as well as a list of prohibited personnel practices, that largely track those recognized by the CSRA. Compare *id.* Intro. ¶ VIII, with 5 U.S.C. 2302(b).

The CSRA's enforcement provisions for prohibited personnel practices, see 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703, largely apply to the FAA. 49 U.S.C. 40122(g)(2)(H). Those provisions direct employees who wish to challenge prohibited personnel practices to file a complaint with the Office of Special Counsel (OSC), 5 U.S.C. 1214(a)(1) and (3). If OSC finds reasonable grounds to believe an employee was or is to be subjected to a prohibited personnel practice, it may seek remedial action from the agency and the MSPB. 5 U.S.C. 1214(b)(2). An employee may seek judicial review in the Fed-

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[3] See 5 U.S.C. 2302(a)(2)(A) ("personnel action" means an appointment, promotion, disciplinary or corrective action, a detail, transfer, or reassignment, reinstatement, restoration, reemployment, performance evaluation, decisions concerning pay, benefits, or awards, a decision to order psychiatric testing, and any other significant change in duties, responsibilities, or working conditions). Although the FAA system does not expressly define "personnel action," in practice, the term has been given the same meaning as under the CSRA.

eral Circuit of any adverse decision of the MSPB in any case in which OSC has sought corrective action from the MSPB. 5 U.S.C. 1214(c)(1), 7703(b)(1); 49 U.S.C. 40122(g)(2)(A) and (H). Neither the CSRA nor the FAA system generally provides for review by the MSPB or judicial review of OSC's determination not to seek remedial action from the MSPB, *ibid.*[4] OSC must, however, provide the employee with its proposed findings of fact and legal conclusions, an opportunity to comment on them, and a final statement concerning the disposition of the complaint. 5 U.S.C. 1214(a)(1)(D) and (2). The CSRA and the FAA system expressly preserve any right or remedy available to an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other anti-discrimination laws. 5 U.S.C. 2302(d); *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii).

c. *Grievances.* Chapter 71 of Title 5 governs federal labor relations and the work-related grievances of employees covered by a collective bargaining agreement (CBA). With one exception not implicated here, Chapter 71 applies to the FAA. 49 U.S.C. 40122(g)(2)(C). That chapter accords federal employees the right to join unions and obligates management to engage in collective bargaining. 5 U.S.C. 7102, 7111, 7114(a)(1), 7117. A union that is the exclusive representative of a designated unit, see 5 U.S.C. 7111, has a duty to represent the employees in that unit without discrimination and without regard to union membership. 5 U.S.C. 7114(a)(1).

The CSRA and the FAA system require that every CBA contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1), although certain specified categories of disputes are excluded by statute from the grievance procedure, 5 U.S.C. 7121(c), and a CBA "may exclude any matter

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[4] An employee who brings a prohibited personnel practice claim involving whistleblowing covered by 5 U.S.C. 2302(b)(8) may seek corrective action from the MSPB if the OSC does not do so, and may seek judicial review of the MSPB's disposition of that claim. See 5 U.S.C. 1214(a)(3) and (c), 1221.

from the application of the grievance procedures," 5 U.S.C. 7121(a)(2). "Grievance" is defined broadly to include "any complaint * * * by any employee concerning any matter relating to the employment of the employee," 5 U.S.C. 7103(a)(9)(A), which includes (but is not limited to) both prohibited personnel practices and adverse actions. See 5 U.S.C. 7103(a)(9)(A) and (C)(ii). Any covered grievance that is not settled by the negotiated grievance procedure "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(1)(C)(iii).

Either the union or the agency may challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), which may "take such action and make such recommendations concerning the [arbitrator's] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a). An FLRA decision concerning an arbitration award is not generally subject to judicial review, unless the matter involves an unfair labor practice; in such case, any "person" aggrieved by the FLRA order (including the agency, see 5 U.S.C. 7103(a)(1)) may seek review in the D.C. Circuit or the court of appeals for the circuit in which the person resides or transacts business. See 5 U.S.C. 7123(a)(1). The CSRA also provides a right to seek direct judicial review of an arbitrator's award in limited circumstances: if the grievance involves a major adverse action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the MSPB. See 5 U.S.C. 7123(a)(1), 7122(a), 7121(f). The FLRA does not have authority to review the arbitral award concerning such a matter. See 5 U.S.C. 7122(a).

Employees who are not members of the bargaining unit and who have been the subject of minor adverse actions may pursue an internal agency grievance mechanism. See *Pers. Mgmt. Sys.* Ch. III, ¶ 4. Non-bargaining-unit employees (like

bargaining-unit employees) have no right to judicial review of minor adverse actions. See *id.* Ch. III, ¶ 4(f)(ii).

3. *The 1994 CSRA Amendment.* Before 1994, the CSRA gave employees a choice of avenues to address major adverse actions and those prohibited personnel practices that involve discrimination, but not other actions. If an employee covered by a CBA brought a grievance alleging a prohibited practice of discrimination under 5 U.S.C. 2302(b)(1) or involving an adverse action covered by 5 U.S.C. 4303 or 7512, the employee could elect to contest it either under the CBA's grievance procedures or under an alternative statutory procedure, many of which (*e.g.*, Title VII, or 5 U.S.C. 7703) independently provide for judicial review, 5 U.S.C. 7121(d) and (e). Section 7121(a)(1) stated that if the grievance did not involve a prohibited personnel practice based on discrimination (covered by subsection (d)) or a major adverse action (covered by subsection (e)), the negotiated grievance procedures "shall be the *exclusive procedures* for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988) (emphasis added).

In 1994, Congress added a new subsection (g) to Section 7121, which also gives employees covered by CBAs a choice of alternative remedies for prohibited personnel practices that do not involve discrimination. Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under new subsection (g), employees have the option to pursue any remedies they may have with OSC or the MSPB, or through the negotiated grievance process. *Ibid.* Congress also made a "Technical and Conforming Amendment[]," § 9(c), 108 Stat. 4366, that made two revisions to the second sentence of Section 7121(a)(1): it added subsection (g) to its list of statutory exceptions to the provision making grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection [which permits matters to be excluded from negotiated grievance procedures], any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

4. *Proceedings in This Case.* a. Petitioner works for the FAA in Alaska as an Air Traffic Assistant. Pet. 2-3. As an FAA employee "whose duties include responsibility for safety-sensitive functions," petitioner is subject to random testing for illegal use of controlled substances. 49 U.S.C. 45102(b)(1) (2000 & Supp. II 2002). Petitioner's work is governed by a CBA entered into by the FAA and his union, the National Association of Government Employees. Pet. App. 2a. The CBA provides for both a mandatory grievance procedure and binding arbitration. See J.A. 21-28.

In June 2001, acting pro se, petitioner filed an unfair labor practice charge with the FLRA, alleging that the FAA had subjected him to a disproportionate number of drug and alcohol tests, Pet. App. 12a-13a, and claiming that the FAA's testing program "does not guarantee individual rights and the randomness of the selection process is suspect," *id.* at 3a. The FLRA denied petitioner's unfair labor practice charge, because the claim did not allege discrimination by the FAA based on protected union activity. *Ibid.* The FLRA explained that petitioner's "recourse is through the grievance procedures" of the CBA. *Ibid.* (internal quotation marks omitted).

Petitioner did not invoke the CBA's grievance procedures. Pet. App. 3a. Instead, again acting pro se, petitioner filed this suit in federal district court. *Ibid.*; J.A. 11. Petitioner's complaint alleged that the FAA had required him to take a disproportionate number of drug tests and the agency had thereby

"violated Title 49 U.S.C. 5331(d)(8)," governing alcohol and drug testing of mass transit employees, "which states that the Secretary of Transportation shall develop requirements that shall 'ensure that employees are selected [for testing] by non-discriminatory and impartial methods.'" J.A. 7, 13; see 49 U.S.C. 45104(8) (imposing same duty on FAA Administrator). Petitioner alleged that "[b]y [his] own informal methods," J.A. 9, he had determined that he had been subjected to a higher number of tests than other employees. *Ibid.* Petitioner asked that the FAA be required to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," J.A. 11, and, if the survey established that he had been tested excessively, to "remedy the situation" by, for example, "enjoining the [FAA] from subjecting [petitioner] to any further substance-testing" until similarly situated employees had been tested as many times as he. *Ibid.*

In a motion to supplement his complaint, petitioner alleged that, while at work on September 25, 2002, he had been required to submit to a substance-abuse test to "make up" an earlier test that he had missed. J.A. 13. Petitioner alleged that the FAA was not authorized "to conduct a makeup test," J.A. 17, and that "[t]he incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample." J.A. 19.

The district court dismissed petitioner's action. The court held that, in light of the CSRA's comprehensive remedial scheme, federal courts have "no power to review federal personnel decisions * * * unless such review is expressly authorized by Congress in the CSRA," Pet. App. 14a, and that petitioner's sole remedy was to submit his claims under the CBA's grievance and arbitration procedures. *Ibid.* The court also concluded that, because petitioner "fail[ed] to exhaust his

administrative remedies," the court could not provide him with a judicial remedy. *Id.* at 14a & n.17 (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984)).

b. The court of appeals affirmed. Pet. App. 1a-11a. It concluded that the FAA Personnel Management System precluded a direct action in federal court and made the CBA's negotiated grievance procedures petitioner's sole remedy. The court explained that the "well-established rule" is that, in light of the comprehensive remedial scheme provided by the CSRA and the FAA system, courts presume that they "have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." *Id.* at 7a. The court acknowledged that the Federal Circuit and the Eleventh Circuit had concluded that the 1994 amendment adding the word "administrative" to Section 7121(a)(1) implicitly authorized courts to review the grievances of federal employees covered by a CBA by limiting the scope of the exclusivity of the grievance procedures. *Id.* at 6a-7a (citing *Asociacion De Empleados* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003); *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002)). The court rejected that position, concluding that, in light of the comprehensiveness of the CSRA, implicit authorization was insufficient to support judicial review. Pet. App. 9a-10a.

The court of appeals also held that, even if (as petitioner maintained) his claim should be viewed as a "prohibited personnel practice" rather than a grievance, petitioner was required under the FAA system (and the CSRA) to seek corrective action from the OSC, and that that exclusive remedy "preclude[s] judicial review of [petitioner's] claimed 'prohibited personnel practice.'" Pet. App. 10a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the FAA Personnel Management System's negotiated grievance proce-

dure provides the exclusive remedy for the grievances of employees who are covered by CBAs, and precludes a suit in district court wholly outside the CSRA's comprehensive remedial scheme. This Court has often held that the omission of a judicial-review provision for a particular type of claim from a comprehensive remedial scheme operates to foreclose further review of those claims. This Court repeatedly has applied that principle to hold that the CSRA's comprehensive remedial scheme limits federal employees to the remedies explicitly provided by statute. See *Fausto*, *supra*; *Karahalios* v. *National Fed'n of Employees*, 489 U.S. 527 (1989); *Bush*, *supra* (reaching same conclusion under pre-CSRA scheme). Petitioner errs in contending that the CSRA and FAA system permit federal employees to seek review of grievances under the Administrative Procedure Act (APA). This Court in *Fausto* rejected the argument that the CSRA preserved employees' remedies under pre-existing statutes (there, the Tucker Act and Back Pay Act); that conclusion applies *a fortiori* to the APA, which explicitly states that its provisions are inapplicable if another statute implicitly or explicitly "preclude[s] judicial review." 5 U.S.C. 701(a)(1).

Permitting district court review of employee grievances would disregard Congress's clear intent to channel employment claims through administrative mechanisms before review by the courts of appeals, and thereby foster the creation of a uniform body of federal employment law and eliminate duplicative and inefficient review of agency action in the district courts. Petitioner's reading also would invert the CSRA's basic scheme, by requiring exhaustion for the most serious personnel actions, such as removal, but allowing employees with even minor grievances to proceed directly in district court. The history of the 1994 technical and conforming amendment that added the word "administrative" to Section 7121(a)(1) shows that Congress did not intend to depart in a subtle and circuitous fashion from the well-established

principle that the remedies expressly provided by the CSRA are exclusive and to create a new implicit right to judicial review of employee grievances in district court.

II. The court of appeals correctly affirmed the dismissal of petitioner's constitutional claim, because petitioner was required to present his objections through the remedial avenues established by the CSRA. The CSRA's extensive system of remedies permits resolution of complaints involving alleged constitutional violations, and the MSPB, the FLRA, and the OSC are all able to address and resolve constitutional claims. If petitioner had declined to take a drug test, he would have had several administrative avenues for review of his claim that would have culminated in judicial review. By electing to submit to the tests, he nevertheless retained significant administrative remedies that could have afforded him relief.

The structure of the CSRA, which generally channels all workplace claims through specified administrative bodies and provides for district court review in only a small handful of circumstances not present here, reflects Congress's intent that grievances must be presented for administrative review. Precluding suits brought directly in district court permits the FAA and the FLRA to bring their expertise to bear on the resolution of claims, allows them to resolve many disputes, and produces a useful record for whatever subsequent judicial consideration may be available. If a grievance raises a substantial constitutional claim that remains at the end of the administrative process, the CSRA should not be construed to preclude review in the court of appeals at that point to consider the constitutional issue. But because Congress has made a reasonable categorical judgment that occurrences that do not constitute "major adverse actions" or "personnel actions" are not so significant that they must be cognizable through a formal legal process that includes judicial review, it should be exceedingly rare for such an occasion to arise.

ARGUMENT

I. THE CSRA PROVIDES THE EXCLUSIVE REMEDIES FOR THE EMPLOYMENT CLAIMS OF FEDERAL EMPLOYEES

Petitioner does not dispute that the CSRA and the FAA Personnel Management System provide a comprehensive system of administrative and judicial review of work-related claims, and that Congress omitted from that system an express right to judicial review of grievances such as petitioner's.[5] But petitioner argues that "it does not follow from th[at] fact" (Pet. Br. 12) that the CSRA and the FAA system eliminated the district courts' "pre-existing authority," *id.* at 2, to adjudicate certain work-related claims of federal employees that, according to petitioner, "lay entirely outside" the CSRA. *Id.* at 13. Petitioner contends that whether the CSRA itself provides judicial review is "entirely irrelevant" (*id.* at 20) to the availability of judicial review because the APA, together with "statutory provisions requiring the FAA to use nondiscriminatory and impartial drug-testing procedures," provide a statutory cause of action, Pet. Br. 13 (citing 49 U.S.C. 45104(8)). In making that argument, petitioner focuses narrowly on whether Section 7121(a)(1), standing alone, precludes review, see *id.* at 30-31, rather than considering the re-

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[5] As the court of appeals correctly noted, Pet. App. 4a, "it is actually the FAA Personnel Management System * * * that governs the employment rights of FAA employees," rather than the CSRA alone. Because Congress contemplated that the FAA system would be an adaptation of the CSRA designed to "address[] the unique demands on the agency's workforce," 49 U.S.C. 40122(g)(1), and because the FAA system largely mirrors the CSRA and thus is, "[l]ike the CSRA, * * * 'an integrated scheme of administrative and judicial review,'" Pet. App. 4a (quoting *Fausto*, 484 U.S. at 445), analysis of either scheme yields the same conclusion about the availability of judicial review. Petitioner has not argued that any features of the FAA system would alter the analysis, and indeed, appears to use "CSRA" as shorthand for the FAA's system. See, *e.g.*, Pet. Br. 12-14. In the interests of brevity, this brief will sometimes use "CSRA" to encompass the FAA's system.

medial system as a whole. That argument fundamentally misapprehends the preclusive effect of comprehensive remedial schemes such as the CSRA and is contrary to the great weight of precedent from this Court and others indicating that because of the overall structure of the scheme, as opposed to any one statutory provision standing alone, the only remedies available for employees' grievances are those explicitly set forth in the CSRA.

A. The CSRA Precludes Judicial Review Of Grievances Covered By A CBA

1. In determining whether the remedies created by a statute are exclusive, this Court has long looked to its language, structure, and nature. If a statute "embrac[es] an entire subject, dealing with it in all its phases," the comprehensiveness of the statute demonstrates an intent "to prescribe the only rules which should govern the subject." *Cook County Bank* v. *United States*, 107 U.S. 445, 451 (1883). "In the context of [a] statute's precisely drawn provisions," the omission of an explicit right of review "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); accord, *e.g.*, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 305 (1943).

The Court has applied that principle to hold that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies explicitly provided by statute. In *Fausto*, this Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," 484 U.S. at 445, the absence of provision in the CSRA for an excepted-service employee to obtain judicial review of a suspension meant that judicial review was barred and that such employees were precluded from pursuing claims under the Back Pay Act. *Id.* at 448. This Court previously

had recognized a right of action under the Back Pay Act, see *United States* v. *Testan*, 424 U.S. 392, 405-406 (1976), and excepted-service employees had been permitted to bring suits for back pay in the Court of Claims under the Tucker Act before the CSRA's enactment, see, *e.g.*, *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963). But the Court concluded that, in light of the comprehensive nature of the CSRA, it was "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Fausto*, 484 U.S. at 448-449.

The Court applied the same reasoning in declining to infer a private right of action for federal employees to safeguard their statutory right under the CSRA to fair representation. *Karahalios*, *supra*. Noting that the CSRA "expressly provide[s]" employees "an administrative remedy" before the FLRA for a union's breach of its duty, and affords judicial review of the FLRA's decision under 5 U.S.C. 7123(a), this Court declined to infer a judicial right of action in district court against the union. 489 U.S. at 533. Indeed, the Court noted, "[t]o hold that the district court must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA *and to confine the courts to the role given them under the Act*." *Id.* at 536-537 (emphasis added).[6] Consistent with this Court's rulings, the courts of

[6] In *Bush* v. *Lucas*, the Court declined to recognize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages for alleged constitutional violations in employment. While *Bush* concerned the personnel system that the CSRA replaced, courts of appeals uniformly have held that the reasoning of *Bush* precludes *Bivens* actions under the CSRA.

appeals uniformly have held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985).[7]

2. Petitioner suggests that, even if the CSRA might be read to limit *that* statute's remedies to the administrative procedures it prescribes, there is no reason to believe that Congress disturbed "otherwise available judicial remedies" (Pet. Br. 13), including a suit in district court under the APA. This Court rejected that argument nearly two decades ago. In *Fausto*, a federal employee who had been disciplined filed suit in the Claims Court, asserting that that court had jurisdiction under the Tucker Act, 28 U.S.C. 1491, and that he had a cause of action under the Back Pay Act. See *Fausto*, 484 U.S. at 443. The Federal Circuit agreed, concluding that the "omission" of an explicit provision of the CSRA authorizing judicial review did not "operate[] to repeal the grant of judicial review of [an] issue contained in a different statute."

See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Saul* v. *United States*, 928 F.2d 829, 836-839 (9th Cir. 1991); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc).

[7] Accord, *e.g.*, *Formaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.); *Hall* v. *Clinton*, 235 F.3d 202, 203 (4th Cir. 2000); *Gergick* v. *Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993), cert. denied, 511 U.S. 1029 (1994); *Petrini* v. *Howard*, 918 F.2d 1482, 1484-1485 (10th Cir. 1990); *Montplaisir* v. *Leighton*, 875 F.2d 1, 2-3 (1st Cir. 1989); see *Carter* v. *Gibbs*, 909 F.2d 1452, 1456 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990), held to be superseded by statute in *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002).

Although the Federal Circuit and Eleventh Circuit in *Mudge* and *Asociacion De Empleados* held that the 1994 amendment to the CSRA (see pp. 24-31, *infra*) created a right of judicial review for grievances covered by a CBA, those opinions did not discuss the analytical framework of *Fausto*, or repudiate the principle that remedies in the CSRA are presumptively exclusive. Even after *Mudge*, the Federal Circuit has continued to hold in other contexts that the CSRA's express remedies are exclusive. See, *e.g.*, *Salinas* v. *United States*, 323 F.3d 1047 (Fed. Cir. 2003).

Fausto v. *United States*, 791 F.2d 1554, 1558 (Fed. Cir. 1986) (on reh'g), rev'd, 484 U.S. 439 (1988). This Court decisively rejected that view, holding that Congress's failure to provide for judicial review of such claims within the CSRA's "comprehensive system for reviewing personnel action" bespoke a "deliberate exclusion" that "prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455. Contrary to petitioner's suggestion that Congress must "express[] [its] intent explicitly" when it wants to foreclose judicial review, Pet. Br. 24, this Court made clear that preclusion will be found if it is "*fairly discernible* in the statutory scheme." *Fausto*, 484 U.S. at 452 (emphasis added) (quoting *Block*, 467 U.S. at 351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970))); accord *Morris* v. *Gressette*, 432 U.S. 491, 500-507 (1977).

A straightforward application of *Fausto* compels the conclusion that the CSRA precludes petitioner from suing directly in district court under the APA. Indeed, the basis for preclusion is, if anything, even stronger here than in *Fausto* because the APA (unlike the Back Pay Act and Tucker Act) *explicitly* states that its provisions are inapplicable if another statute "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see 5 U.S.C. 702; *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Congress expressly provided for a right of judicial review of grievances in only two specific circumstances: when the matter involves an adverse action covered by 5 U.S.C. 4303 or 7512, see 5 U.S.C. 7121(f), and when the matter involves a claim of an unfair labor practice and the arbitral award has been reviewed by the FLRA, see 5 U.S.C. 7123(a). Moreover, when Congress wished to preserve existing remedial schemes *outside* the CSRA, it said so: The CSRA expressly preserves employees' right to bring suit under Title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination. 5 U.S.C. 2302(d); see *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii). The "highly selective manner in which Congress has provided

for judicial review" (*Switchmen's Union*, 320 U.S. at 305), given the comprehensive and "integrated scheme of administrative and judicial review" that the CSRA created, is a "manifestation of a considered congressional judgment" that employees do not have a general right to judicial review of workplace complaints. *Fausto*, 484 U.S. at 445, 448; accord *Block*, 467 U.S. at 347; *Erika, Inc.*, 456 U.S. at 208.

Permitting employees covered by a CBA to have a direct right of action in district court beyond the context of Title VII and similar statutes would "seriously undermine" two central "structural elements * * * of the CSRA," *Fausto*, 484 U.S. at 449. First, it would conflict with "the Congressionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). As discussed above, see pp. 6-8, *supra*, where an employee is covered by a CBA, the CSRA channels disputes through the negotiated grievance procedure, and either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's award by the FLRA, 5 U.S.C. 7122(a). Second, a right of district court review would conflict with the "primacy" of the courts of appeals whenever judicial review is available under the CSRA, *Fausto*, 484 U.S. at 449, and would create a "second layer of judicial review" in the district courts, "which Congress meant to eliminate." *Ibid.*; accord *Lindahl*, 470 U.S. at 797. "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; cf. *Fornaro* v. *James*, 416 F.3d 63, 68 (D.C. Cir. 2005) (Roberts, J.) ("Allowing district court actions challenging how OPM calculates civil service benefits * * * would plainly undermine the whole point of

channeling review of benefits determinations to the MSPB and from there to the Federal Circuit.").

Petitioner cites no authority for his novel contention that the APA independently provides for judicial review of federal employee complaints, and, indeed, there is none. The courts of appeals overwhelmingly have held that federal employees may not obtain judicial review under the APA of employment claims for which the CSRA provides no judicial relief.*

3. Petitioner contends (Pet. Br. 35) that the CSRA should be read to permit judicial review to avoid "unjust and absurd results" that Congress could not have intended. But petitioner adopts a far too encompassing standard of absurdity. The canon of construing a statute to avoid absurdities applies only when the construction yielded by other principles of interpretation is "in a genuine sense[] absurd, *i.e.*, where it is quite impossible that Congress could have intended the result * * * and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *United States DOJ*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in the judgment); accord *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819). Petitioner's claimed "absurd results" fall far short of that high standard.

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* *E.g.*, *Graham* v. *Ashcroft*, 358 F.3d 931, 932 (D.C. Cir.) (Roberts, J.), cert. denied, 125 S. Ct. 83 (2004); *Tiltti* v. *Weise*, 155 F.3d 596, 601 (2d Cir. 1998); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 201 (6th Cir. 1990); *Weatherford* v. *Dole*, 763 F.2d 392, 393, 394 (10th Cir. 1985); *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Veit*, 746 F.2d at 511; *Billop* v. *Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984); *Carducci*, 714 F.2d at 174-175; *Broadway* v. *Block*, 694 F.2d 979, 983-984 (5th Cir. 1982). The sole exception predated *Fausto*, see *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984), and is of doubtful continuing validity. See, *e.g.*, *Taydus* v. *Cisneros*, 902 F. Supp. 288, 293 n.3 (D. Mass. 1995) (stating that, in light of *Fausto* and more recent circuit precedent, it is likely that "the First Circuit would not find a cause of action under the APA if faced with the issue today").

a. Petitioner first contends that reading the CSRA to preclude this suit in district court would permit FAA employees who fail or refuse a drug test, and who are subject to major adverse actions as a result, to obtain judicial review of their challenges to the drug test under 5 U.S.C. 7703, while precluding a compliant employee who tests negative from doing so. Pet. Br. 35. Petitioner is correct that an FAA employee who refuses or fails a drug test is potentially subject to various adverse actions, including removal. See *e.g.*, Office of Human Res. Mgmt., DOT, *Drug and Alcohol Testing Guide* at X-1 to X-6 (1994) <http://dothr.ost.dot.gov/ HR_Programs/ Drug_and_Alcohol/revised guide.pdf>. Petitioner is also correct (Pet. Br. 36-37) that an employee facing a major adverse action may appeal to the MSPB and ultimately obtain review from the Federal Circuit. See 5 U.S.C. 4303(e), 7513(d), 7703(a)(1) and (b)(1); 49 U.S.C. 40122(g)(3). By contrast, under the CSRA, a bargaining-unit employee who takes and passes a drug test and suffers no adverse action, but who nevertheless wishes to contest the FAA's decision to test him, must initiate a grievance, which ordinarily culminates in arbitration rather than judicial review. However, there is nothing "paradoxical" or "unfair" (Pet. Br. 37) about that result. It reflects a fundamental aspect of the CSRA scheme in which major adverse actions are subject to more searching review than minor disputes. The scheme reflects that "Congress was concerned about 'the respective costs and benefits' of federal personnel-related litigation, and therefore carefully calibrated the degree of procedural protections available under CSRA to the severity and motivation of the action complained of." *Hubbard* v. *EPA*, 809 F.2d 1, 8 (D.C. Cir. 1987) (citation omitted) (quoting *Bush*, 462 U.S. at 388), aff'd on reh'g *sub nom. Spagnola* v. *Mathis*, 859 F.2d 223, 225 (D.C. Cir. 1988) (en banc); accord *Pinar* v. *Dole*, 747 F.2d 899, 907 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

The interpretation petitioner advocates, on the other hand, would "invert[ ] [the] preference[s]" embodied in the CSRA itself. *Fausto*, 484 U.S. at 450. Under petitioner's view, federal employees could proceed directly to district court to challenge relatively minor employment actions, while employees who were subject to major actions such as removal would be required to employ the CSRA's administrative procedures with judicial review in the Federal Circuit. Because petitioner's interpretation "would give [employees] greater rights" for the review of even trivial complaints "than the CSRA affords for major adverse actions," it must be rejected. *Graham* v. *Ashcroft*, 358 F.3d 931, 935 (D.C. Cir.) (Roberts, J.), cert. denied, 125 S. Ct. 83 (2004); accord *Fausto*, 484 U.S. at 450; *Carducci*, 714 F.2d at 174-175 (Scalia, J.).

b. Petitioner also asserts that it would be "absurd" (Pet. Br. 39) to read the CSRA to give unions the authority to decide whether to include a matter within a CBA's grievance procedures, to choose whether to arbitrate a grievance on behalf of an employee, and to decide whether to seek available review of the arbitration decision. *Id.* at 39 & n.23, 43. Petitioner's labor-union amici incongruously suggest (NTEU Br. 6, 22; AFGE Br. 11) that it is problematic for the CSRA to leave such decisions in the hands of unions, because "[t]he union's interests and those of the individual employee are not always identical or even compatible." AFGE Br. 11 (quoting *McDonald* v. *City of W. Branch*, 466 U.S. 284, 291 (1984)). To support that argument, amici rely exclusively on non-federal employment cases to suggest that, because unions control grievance proceedings, employees should be free to pursue judicial remedies instead of pursuing a grievance. See NTEU Br. 22 (citing *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981)); AFGE Br. 11 (citing *McDonald*).

Those arguments overlook the fundamental distinction between federal and non-federal employment; indeed, in the specific context of judicial review, this Court has rejected

efforts to analogize federal civil-service cases to other labor cases because of differences in the applicable legal regimes. *Karahalios*, 489 U.S. at 534. "[T]he CSRA not only expressly recognizes the [union's] fair representation duty but also provides for its administrative enforcement," *ibid.*, by making breach of that duty an unfair labor practice, see *id.* at 532, which is actionable before the FLRA, 5 U.S.C. 7118, and subject to review and enforcement in the courts of appeal, 5 U.S.C. 7123(a) and (b). Thus, should a union decline to seek arbitration or subsequent FLRA review of a meritorious claim, it would expose itself to an unfair labor practice complaint by the affected employee, see *O'Connell* v. *Hove*, 22 F.3d 463, 471-472 (2d Cir. 1994); *Steadman* v. *Governor, U.S. Soldiers' Home*, 918 F.2d 963, 966 (D.C. Cir. 1990). Also, a union can negotiate with agencies to exclude from the mandatory grievance procedure matters which it believes it would be unlikely to pursue in arbitration, see 5 U.S.C. 7121(a)(2), thus freeing employees to pursue any remedies they have under other provisions of law.

Petitioner contends (Pet. Br. 39) that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), establishes a general principle, applicable even under the CSRA, that CBAs "cannot waive employees' rights to seek judicial redress for statutory claims." Pet. Br. 39 (emphasis deleted); see NTEU Br. 14 & n.9 (citing *Barrentine*). That case is inapposite. In *Gardner-Denver*, the Court held, in the context of private-sector employment, that a union cannot through a CBA waive an employee's right under Title VII of the Civil Rights Act of 1964 to bring an action in district court based on an allegedly discriminatory employment action. 415 U.S. at 51. To begin with, the CSRA and the FAA system explicitly incorporate the holding of *Gardner-Denver* by expressly preserving an employee's separate statutory right to bring suit under Title VII and other anti-discrimination legislation, 5 U.S.C. 2302(d); *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii); 5 U.S.C. 7702,

7703(b)(2), 7121(d). The statute on which petitioner relies here, by contrast, provides standards for the conduct of alcohol and drug tests by the FAA, but confers no right of action. See 49 U.S.C. 45101 *et seq.* And the CSRA itself does not confer or preserve any such right of action.

In any event, *Gardner-Denver* explicitly turned on the "distinctly separate nature" of contractual rights guaranteed by CBAs and statutory rights created by Congress. *Gardner-Denver*, 415 U.S. at 50; accord *Barrentine*, 450 U.S. at 737. By contrast, "federal employment does not rest on contract in the private sector sense," *Karahalios*, 489 U.S. at 535, and for that reason, the courts of appeals repeatedly have held *Gardner-Denver*'s reasoning is "misplaced" in the context of federal employment. *Carter* v. *Gibbs*, 909 F.2d 1452, 1457 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); accord *Abbott* v. *United States*, 144 F.3d 1, 5 (1st Cir. 1998); *O'Connell*, 22 F.3d at 471. Under the CSRA, employees' statutory rights are not distinct from their contractual rights, but rather both "are consolidated within the four corners of the collective [bargaining] agreement: Congress defined a 'grievance' to include contractual disputes *and* 'any claimed violation . . . of any law,'" *Carter*, 909 F.2d at 1457 (emphasis added) (quoting 5 U.S.C. 7103(a)(9)(C)); *see O'Connell*, 22 F.3d at 471, reflecting an intent that statutory claims would be subject to grievance procedures and binding arbitration. Cf. *Barrentine*, 450 U.S. at 740 (holding that Fair Labor Standards Act (FLSA) claims are not barred by prior submission to CBA procedures, because "no other forum for enforcement of statutory rights is referred to or created by the statute").

B. The 1994 Amendments To The CSRA Did Not Confer A Right To Judicial Review Of Grievances Covered By A CBA

Petitioner and his amici contend that Congress amended Section 7121(a)(1) in 1994 to "override," Pet. Br. 33, the en

banc Federal Circuit's holding in *Carter*, *supra*, that the CSRA provides the exclusive procedures for resolution of employee grievances. See NTEU Br. 11-19; AFGE Br. 23-26. To hold otherwise, petitioner contends, would render the term "administrative" in Section 7121(a)(1) "entirely superfluous." Pet. Br. 28. That argument lacks merit. As the court of appeals correctly concluded, Pet. App. 9a-10a, Congress's 1994 technical amendment to Section 7121(a)(1) did not reverse the longstanding and uniform interpretation by the federal courts and create in a remarkably subtle and circuitous manner a new and unprecedented right to judicial review of federal employee grievances.

1. In *Carter*, the en banc Federal Circuit held that federal employees covered by a CBA could not bring suit in district court for overtime pay under the Fair Labor Standards Act, and that "the procedures [set out in the CBA] * * * [were] the exclusive procedures for resolving grievances which fall within its coverage." 909 F.2d at 1454 (quoting 5 U.S.C. 7121(a)(1) (1988)). Citing *Lindahl*, *Bush*, *Fausto*, and *Karahalios*, the court declined to recognize a right to judicial review because "Congress narrowly circumscribed the role of the judiciary in its carefully crafted * * * scheme" by providing for judicial review only in certain instances. *Id.* at 1456. At the time of the 1994 amendment, the *Carter* decision was "widely adopted" (Pet. Br. 33) by other federal courts, which uniformly held that the CSRA precludes employees subject to a CBA's grievance procedures from bypassing those procedures and seeking judicial review.[9] Consistent with *Fausto* and *Karahalios*, the courts of appeals without exception also had held more generally that the CSRA precludes judicial review of various statutory and non-statutory

[9] See, *e.g.*, *O'Connell*, *supra*; *Johnson* v. *Peterson*, 996 F.2d 397, 398 (D.C. Cir. 1993); *Saul*, 928 F.2d at 842 n.23; see also *Abbott*, 144 F.3d at 2, 6 n.4 (discussing *Carter*); *Parker* v. *King*, 935 F.2d 1174, 1176, 1178 (11th Cir. 1991) (same).

claims unless the Act expressly provides for such review.[10] See generally *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (presuming congressional awareness of lower-court decisions).

2. Petitioner contends that, by adding the single word "administrative" to Section 7121(a)(1) in 1994, Congress, "without explanation" (Pet. Br. 34), overruled the uniform holdings of at least four federal courts of appeals, see p. 25 & n.9, *supra*, and conferred district court jurisdiction over employee grievances. Petitioner does not argue that the 1994 amendment *explicitly* created a right of judicial review; rather, he argues that the amendment "strongly suggests" that Congress intended to create a right of judicial review. Pet. 14. But it was clearly established in 1994 that only an *express* statutory provision would create a right of judicial review because "the CSRA's 'integrated scheme of administrative and judicial review' foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at 536 (quoting *Fausto*, 484 U.S. at 445). Indeed, the legislative history of the bill that contained the 1994 amendment clearly indicates that Congress was aware that it would be "necess[ary] [to] *explicitly stat[e]* when Congress intends to give employees a choice of remedies." *Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office & Civil Serv.*, 103d Cong., 1st Sess. 22 (1993) (statement of Robert M. Tobias, President, NTEU) (emphasis added). There is thus no reason to believe that Congress would have thought in 1994 that simply inserting the word "administrative" in Section 7121(a)(1) would

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[10] See, *e.g.*, *Berrios* v. *Department of the Army*, 884 F.2d 28, 31-32 (1st Cir. 1989); *O'Connell*, 22 F.3d at 470-471; *Pinar*, 747 F.2d at 910-911; *Broadway*, 694 F.2d at 983-984; *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991); *Schwachta* v. *Curtis*, 752 F.2d 1257, 1259-1260 (7th Cir. 1985); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984); *Veit*, 746 F.2d at 510-511; *Petrini*, 918 F.2d at 1484-1485; *Broughton* v. *Courtney*, 861 F.2d 639, 644 (11th Cir. 1988); *Harrison* v. *Bowen*, 815 F.2d 1505, 1515 (D.C. Cir. 1987).

create a new right to judicial review of matters subject to CBA grievance procedures. See *Karahalios*, 489 U.S. at 536 (noting that because "Congress undoubtedly was aware" of the standard for recognizing implied private rights of action, "we would expect to find some evidence of that intent in the statute or its legislative history").

Furthermore, to read Section 7121(a)(1) implicitly to authorize judicial review would produce a significant anomaly. Federal agencies have established their own grievance procedures for employees who are not covered by CBAs and therefore are not covered by the grievance procedures contained in such agreements. See 5 C.F.R. 771.201(a) (1995) (requiring such grievance procedures).[11] Petitioner's interpretation of amended Section 7121 would permit bargaining-unit employees to avoid the grievance procedures and present their grievances directly to the courts. But because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to pursuing their agencies' internal grievance procedures and would be precluded from obtaining judicial review. That preferential treatment of employees subject to CBAs makes no sense. There is no reason to believe that Congress intended to grant federal employees who have the benefit of union representation and arbitration a right to bypass the procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while at the same time limiting other federal employees to grievance procedures over which they had no say in adopting.

3. Petitioner contends (Pet. Br. 28) that the "most natural construction of the phrase 'exclusive administrative proce-

[11] The Office of Personnel Management rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 C.F.R. 771.101.

dures' is one that recognizes the existence, and continued vitality, of *non*-administrative procedures." But petitioner's suggested reading is not the most natural one and certainly is not necessary to avoid "render[ing] the word ['administrative'] entirely superfluous." *Ibid.* The relevant "[e]xcept[ed]" subsections—(d), (e), and (g)—all provide for a choice of *other administrative* remedies, often including subsequent judicial review. Therefore, Section 7121(a)(1)'s reference to a general rule of exclusivity for the administrative process of the CBA, subject to exceptions for situations in which the statute provides an alternative administrative process, makes perfect sense as a description of available administrative remedies, without creating any implications for the wholly separate question of judicial review. Also, before the amendment, Section 7121(a)(1)'s statement that the CBA's grievance procedure constituted the "exclusive procedure[] for resolving grievances which fall within its coverage" was, if construed to include the "procedure" of judicial review, in tension with Section 7121(f)'s explicit provision for judicial review of arbitrator awards in grievance proceedings involving adverse employment actions covered by 5 U.S.C. 4303 and 7512, and "similar" matters under other personnel systems. The amendment conformed subsections 7121(a)(1) and (f) by clarifying that subsection (a)(1)'s exclusive procedures provision did not implicitly compromise the ability of employees to seek judicial review in the instances specified in subsection (f), even where the employee *did* elect to invoke the grievance procedures under the CBA. See Gov't Br. 19. That rather modest function, unlike the transformative consequences attributed to the addition of a single word by petitioner, is perfectly consistent with the amendment's status as a technical correction.[12] See *Director of Rev.* v. *CoBank ACB*, 531 U.S.

[12] This Court has indicated that the canon against interpreting a word as "surplusage" has little weight in construing technical amendments. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 & n.6 (1980).

316, 323-324 (2001) (stating that "it would be surprising, indeed," if Congress had made "a radical—but entirely implicit" change in a technical and conforming amendment).

4. The legislative history of the 1994 amendment confirms that Congress did not intend to create a new right of judicial review of grievances. The 1994 amendment was enacted as a provision of H.R. 2970 during the 103d Congress. As passed by the House of Representatives, the bill contained three provisions of note. First, in a subsection entitled "choice of remedies provision *not* involving judicial review," the bill proposed a new subsection 7121(g) to provide a choice of remedies for employees claiming prohibited personnel practices not involving discrimination. H.R. 2970, 103d Cong., 2d Sess. § 5(e) (Oct. 3, 1994) (emphasis added); 140 Cong. Rec. 27,360 (1994). Second, in a subsection entitled "choice of remedies provision *involving* judicial review," the bill proposed adding a new section to the CSRA permitting employees to bring suit in district court to challenge a personnel action taken in retaliation for whistleblowing. H.R. 2970, § 5(c) (emphasis added); 140 Cong. Rec. at 27,359. Third, a separate provision of the bill contained "conforming amendments" that proposed inserting the word "administrative" in Section 7121(a)(1) and included new subsection (g) among the exceptions to the section's administrative exclusivity provision. H.R. 2970, § 2(b)(2); 140 Cong. Rec. at 27,358.

The Senate removed the provision permitting district court review of personnel actions involving whistleblowers, but retained the other two provisions. Both of those provisions were contained in the same section, which was entitled "authorities relating to arbitrators and choice of remedies not involving judicial review." See H.R. 2970, 103d Cong., 2d Sess. § 9 (Oct. 7, 1994); 140 Cong. Rec. at 29,351. Congress enacted the Senate version of the bill. See 108 Stat. 4365.

That history refutes any suggestion that by adding the word "administrative," Congress wished to create a general

right for employees to seek judicial review of grievances covered by a CBA. Congress deleted the only provision of the bill that explicitly would have permitted initial district court review. And in describing the enacted bill, its sponsor, Representative McCloskey, noted that the Senate had "delet[ed] the provision * * * allowing an action de novo in a Federal court" for whistleblower complaints (140 Cong. Rec. at 29,352; see 139 Cong. Rec. 19,616 (1993)), with no suggestion that the bill's amendment to Section 7121(a)(1) authorized federal court review. McCloskey also noted a provision of the bill that permitted "[j]udicial review" of certain disciplinary actions taken by arbitrators under a newly created provision, see 140 Cong. Rec. at 29,353 (discussing 5 U.S.C. 7121(b)(2)(B)), but tellingly said nothing to indicate that the bill created a general right for employees to seek review of other grievances in district court. Moreover, the legislative history of the enacted bill clearly states that one provision was adopted to overturn the Federal Circuit's decision in *Clark* v. *Department of the Army*, 997 F.2d 1466 (1993), cert. denied, 510 U.S. 1091 (1994), concerning the burden of proof in whistleblower cases. See H.R. Rep. No. 769, 103d Cong., 2d Sess. 14-15 (1994); 140 Cong. Rec. at 29,352-29,353 (statement of Rep. McCloskey). But that legislative history is silent about any intent to overrule *Carter*.

Petitioner (Br. 32-35) and amicus NTEU (Br. 17-19) contend that the legislative history of *another* bill considered earlier in the 103d Congress, H.R. 2721—which was *not* enacted—demonstrates that Congress added the word "administrative" to Section 7121(a)(1) to overrule *Carter*. As petitioner notes, Br. 33, the report on H.R. 2721, which was reported by a different committee in the House, reflected an intent to overrule *Carter* and permit employees to bring suit directly in federal court. See H.R. Rep. No. 599, 103d Cong., 2d Sess. Pt. 1, at 56 (1994). Because both the unenacted H.R. 2721 and the enacted H.R. 2970 proposed adding the word

"administrative" to Section 7121(a)(1), petitioner contends (Br. 33) that the enacted bill should be read to have the same purpose and effect as the unenacted H.R. 2721. That contention is mistaken.

This Court has cautioned against inferring the intent of Congress from a bill that was not enacted. See *United States* v. *Craft*, 535 U.S. 274, 287 (2002). Caution is particularly warranted here because, although both bills would have added the word "administrative" to Section 7121(a)(1), that is where the similarities end. The unenacted bill would have given employees broad access to district court to bring employment-related discrimination claims. H.R. 2721, 103d Cong., 2d Sess. § 2(b)(5) (Aug. 19, 1994); *id.* § 3(a)(1)(B); *id.* § 4(a), (b). Indeed, the section of the bill that added the word "administrative" *also* amended Section 7121 explicitly to provide employees with a right to pursue in district court discrimination claims covered by a CBA's grievance procedure. H.R. 2721, § 4(a)(2). None of those provisions, however, was contained in the enacted bill. Cf. 140 Cong. Rec. at 29,352 (statement of Rep. McCloskey) (noting that the enacted bill was "far less comprehensive" than H.R. 2721). To the extent that this unenacted text is relevant at all, it demonstrates that when Congress intends to add judicial remedies to the comprehensive CSRA regime, it does so expressly, not elliptically. It therefore would be inappropriate to rely on the legislative history of the unenacted bill. See *HUD* v. *Rucker*, 535 U.S. 125, 133 n.4 (2002).[13]

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[13] In any event, an intent to overrule *Carter* does not imply an intent to permit judicial review of any claim that could be brought under a CBA's grievance procedures. *Carter* held that the CSRA barred a federal employee from bringing a statutory cause of action under the FLSA, 29 U.S.C. 216(b), if the grievance was covered by a CBA. 909 F.2d at 1458. Petitioner cites nothing in the legislative history of the two bills suggesting that even the proponents of overruling *Carter* intended to extend judicial review to the myriad grievances for which there is no other specific statutory cause of action, such as the one at issue here. If anything, the report on the unenacted bill suggests a narrower

II. PETITIONER'S CONSTITUTIONAL CLAIMS MUST BE RAISED THROUGH THE PROCEDURES PRESCRIBED BY THE CSRA

In addition to his claim that the FAA's substance testing of him violates provisions of Title 49 governing employee testing, petitioner also has argued, during the course of this litigation, that the FAA's testing of him violated an ever-expanding number of his constitutional rights. Petitioner does not, however, challenge the validity of the FAA's random drug-testing program under the Constitution. He contends only that the drug-testing program was misapplied to him because he was selected for testing more often than other employees.[14]

Consistent with the views of the majority of circuits and binding circuit precedent, see *Saul* v. *United States*, 928 F.2d at 843,[15] the court of appeals below held that petitioner could

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intent to preserve only specific statutory causes of action of the sort at issue in *Carter*. See H.R. Rep. No. 599, Pt. 1, at 56 (emphasizing that *Carter* "denied employees the right to judicial review of claims under the Fair Labor Standards Act").

[14] In the district court and court of appeals, petitioner alleged that the testing violated 49 U.S.C. 5331(d)(8) and that the September 2002 make-up test violated his First Amendment right to privacy. See, *e.g.*, J.A. 7, 13; Pet. C.A. Br. 18, 19, 21, 22. After petitioner obtained counsel, he alleged in his certiorari petition that the FAA had "violated 49 U.S.C. 45104(8) and his constitutional right of privacy." Pet. 2. In his reply brief at the certiorari stage, petitioner alleged for the first time that the government had violated "the First, Fourth, and Fourteenth Amendments." Pet. Reply Br. 6. Finally, in his merits brief, petitioner alleges that the government's conduct violated the "Fourth, Fifth, and First Amendments to the Constitution." Pet. Br. 17.

[15] Accord *Dotson* v. *Griesa*, 398 F.3d 156, 180 (2d Cir. 2005), petition for cert. pending, No. 04-1276; *Lombardi* v. *SBA*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Berrios*, 884 F.2d at 31; *Hallock* v. *Moses*, 731 F.2d 754, 757 (11th Cir. 1984); see *Pinar*, 747 F.2d at 909-912 (holding that CSRA precludes equitable relief, at least where constitutional injury is not major). But see *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (3d Cir. 1995) (holding that CSRA did not foreclose suit seeking equitable relief for constitutional grievance); *Steadman*, 918 F.2d at 967 (same, but requiring administrative exhaustion before suit could be brought).

not bring an action directly in district court to obtain equitable relief based on such a grievance because the CSRA does not provide for such a suit. Pet. App. 10a. The court of appeals therefore correctly affirmed the dismissal of petitioner's complaint in its entirety, including his assertion of a constitutional violation, because petitioner was required to present his objections through one of the several remedial avenues established by the CSRA. Those statutorily prescribed procedures are fully capable of affording relief, and several of them expressly provide for judicial review.

Petitioner's failure to present his grievance through the statutorily prescribed procedure is a sufficient basis to affirm, and affirmance on that ground would avoid this Court's having to resolve definitively the correct forum for bringing a properly presented constitutional claim. Although the presumption in favor of judicial review of constitutional claims would require judicial review of a properly exhausted constitutional claim, the proper forum for such a claim raises a difficult question. Although the entire structure of the CSRA would seem to favor review in the court of appeals, and this Court has applied a presumption in favor of court of appeals review, *Lindahl*, 470 U.S. at 797, the text of the relevant statutory provision would appear to include certain constitutional claims within the exclusion from the court of appeals' otherwise plenary jurisdiction. Allowing court of appeals, as opposed to district court, review would require inferring a limitation to the exception for constitutional claims. The alternative would be to allow the exhausted claims to be brought in district court. Although neither approach is entirely satisfactory—presumably because Congress did not avert to the specific problem of such claims—the former view seems more consonant with the overall structure of the CSRA.

A. The CSRA Provides Comprehensive Procedures For Resolving Employment Disputes Of Federal Employees, Including Those Raising Constitutional Issues

The "remedies currently available" under the CSRA are "elaborate" and "comprehensive," and they were fashioned "with careful attention to conflicting policy considerations." *Bush*, 462 U.S. at 388. That extensive system of remedies is available to address complaints involving alleged constitutional violations. In *Bush*, for example, this Court recognized that constitutional claims (there, that an employee had been demoted in retaliation for the exercise of First Amendment rights) could properly be raised in an appeal of an adverse action to what is now the MSPB. See 462 U.S. at 385-387 & n.33. The FLRA likewise considers constitutional issues in its review of decisions by arbitrators on grievances presented to them under a CBA. See, *e.g.*, *Laborers' Int'l*, 60 F.L.R.A. 202, 203, 207-208 (2004). For claims of discrimination on the basis of race, sex, religion, and other grounds that would violate the Constitution, the CSRA provides or preserves separate statutory remedies, and those provisions bar other causes of action for such claims. *Brown* v. *GSA*, 425 U.S. 820 (1976). Finally, the Special Counsel is responsible for seeking corrective action from an agency or the MSPB in response to complaints by employees concerning personnel actions taken against them without "proper regard for their privacy and constitutional rights," 5 U.S.C. 2301(b)(2); *Pers. Mgmt. Sys.*, Intro. ¶ VII(b), or in violation of any law, rule or regulation that implements or directly concerns the merit system principles set forth in Section 2301—provisions that often serve to safeguard the constitutional interests of federal employees. See 5 U.S.C. 2302(b)(12); *Pers. Mgmt. Sys.* Intro. ¶ VIII(a)(ix).

The CSRA's remedial procedures were fully available to address petitioner's objections to taking drug tests. Indeed, it would not even have been necessary in those proceedings to

decide whether the selection of petitioner for a test violated the Fourth Amendment or some other constitutional provision, because protection at least as broad as that provided by the Constitution is afforded by the statutory provision on which petitioner relies, 49 U.S.C. 45104(8), which requires the agency to select employees for drug or alcohol tests "by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." If petitioner had declined to take a drug test, and if he had then been subjected to removal, suspension of more than 14 days, or reduction in pay or grade as a result, he could have relied on either Section 45104(8) or the Constitution as a defense in a hearing before the MSPB or on judicial review. See, *e.g.*, *Garrison*, 67 M.S.P.R. 154, 158 (1995); cf. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (mine operator could have challenged agency order by refusing to comply and raising objections in subsequent enforcement proceeding). Even if the discipline selected had not been a major adverse action, petitioner could have challenged it by filing a complaint with the OSC, charging that the discipline constituted a prohibited personnel practice because it was taken in violation of 49 U.S.C. 45104(8) or without regard to his privacy or constitutional rights.[16] If the OSC sought corrective action, he would have had a right to seek judicial review of any resulting decision by the MSPB. 5 U.S.C. 1214(c), 7703(b). Indeed, OSC could have sought a

[16] Petitioner contends that OSC lacks jurisdiction over allegations of prohibited personnel practices of FAA employees. Pet. Br. 4-5 n.4, 11 n.10. As discussed in our brief at the petition stage (at 25 n.10), that claim lacks merit because 49 U.S.C. 40122(g)(2)(H) explicitly makes the CSRA's OSC enforcement provisions applicable to the FAA system. See Pet. App. 10a. Although, previously, an ambiguous statement on the OSC website suggested that its jurisdiction over FAA employees was limited to whistleblower claims, see Pet. Br. 4-5 n.4 (citing http://www.osc.gov/ppp.htm#q2 (last visited Aug. 28, 2005)), the website has since been corrected. See http://www.osc.gov/ppp.htm#q2 (last visited Oct. 17, 2005).

stay of the disciplinary action pending its investigation, see 5 U.S.C. 1214(b)(1)(A)(i), thus permitting petitioner to challenge a proposed drug test without requiring him to submit to testing or suffer sanctions.[17]

Petitioner submitted to the tests, and he thereby limited his avenues for pursuing judicial review. Even so, the CSRA afforded him a remedy. The grievance procedures provided under 5 U.S.C. 7121(a)(1) and the CBA remained available to challenge the FAA's selection of him for testing. The grievance procedure is well suited to the nature of petitioner's claim. Petitioner's sole explicit request for relief in district court was to require the FAA to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," J.A. 11, and, if the survey showed that "testing is not random," to order an "appropriate" remedy. *Ibid.* The information petitioner sought could have been developed during the grievance and arbitration process. The result might then have been either to reassure petitioner that his concerns about disproportionate testing were unfounded, to give the FAA information to help it correct any deficiencies on its own or in consultation with the

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[17] Citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), petitioner contends that plaintiffs should be able to challenge a regulatory scheme in court without having to risk sanctions. Pet. Br. 38-39, 46. But in *Thunder Basin*, this Court rejected the contention that judicial review must be available before an agency imposes sanctions. See 510 U.S. at 217-218. In any event, *Abbott Laboratories* only addressed the issue of the appropriate timing for APA review in a situation in which the APA concededly applied. The Court concluded in that case that the specific provisions of the Federal Food, Drug, and Cosmetic Act did not preclude resort to the APA's "generous review provisions," 387 U.S. at 141, because the Act was "designed to give an additional remedy and not to cut down more traditional channels of review." *Id.* at 142; see *Thunder Basin*, 510 U.S. at 212. By contrast, this Court has already concluded that the CSRA was meant to preclude "remedies that had been available before the enactment of the CSRA," *Fausto*, 484 U.S. at 444, and the CSRA forecloses APA review of petitioner's claims.

union, or in any event to furnish a factual basis for a decision by the arbitrator and the FLRA.

The CSRA's comprehensive remedial scheme thus furnished petitioner with a range of options tailored to different circumstances. That remedial scheme is entirely reasonable, both in its general application and in the context of this case.

B. Petitioner May Not Circumvent The CSRA's Mechanisms By Couching His Complaint In Constitutional Terms And Filing Suit Directly In District Court

Rather than pursuing one of the available avenues for relief under the CSRA, petitioner brought this suit directly in district court, wholly outside the CSRA's remedial framework. As explained in Point I, *supra*, the CSRA's comprehensive framework precludes such a suit in district court. Petitioner cannot avoid that preclusion simply by casting his grievance in constitutional terms.

This Court repeatedly has recognized that "government offices could not function if every employment decision became a constitutional matter," *NTEU* v. *Von Raab*, 489 U.S. 656, 666 (1989); accord *City of San Diego* v. *Roe*, 125 S. Ct. 521, 525 (2004); *Connick* v. *Myers*, 461 U.S. 138, 143 (1983), and it is a simple matter to recast minor administrative disputes in constitutional terms. See, *e.g.*, *Eastern Bridge, LLC* v. *Chao*, 320 F.3d 84, 91 (1st Cir. 2003); *Ingram* v. *Secretary of HHS*, 830 F.2d 67 (6th Cir. 1987) (per curiam). Permitting an employee to proceed directly to court with an employment-related grievance involving even minor matters, simply because it has been couched in constitutional terms, would "allow [employees] to circumvent the statutory review process with an agile game of word play," *Eastern Bridge*, 320 F.3d at 91, and upset the balance Congress struck between "the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445.

1. This Court will "find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (quoting *Block*, 467 U.S. at 351). "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Ibid.* (citation omitted). In *Thunder Basin*, for example, this Court held that the Federal Mine Safety and Health Amendments Act of 1977 precluded a pre-enforcement challenge in district court to an order issued by the Mine Safety and Health Administration (MSHA), even though the Act did not expressly preclude such a challenge. In reaching that conclusion, the Court emphasized several factors: (1) that the Act established a "detailed structure" for review of enforcement actions commenced by MSHA if a mine operator refuses to comply with such an order, including a right to a hearing by an expert commission and judicial review in the court of appeals, 510 U.S. at 207-208; (2) that the statutory claims fell within the commission's expertise, *id.* at 214; (3) that the administrative process afforded meaningful review because the commission could address even constitutional questions, *id.* at 215; and (4) that in any event, constitutional claims could be considered on review of the commission's decision in the court of appeals. *Ibid.* The Court concluded that to permit a party to "evade the statutory-review process" would be "inimical to the structure and the purposes of the Mine Act." *Id.* at 216.

It would likewise be "inimical to the structure and purpose" of the CSRA to allow an action in district court in the first instance. Congress intended to channel *all* claims of federal employees through one of the procedural mechanisms it established, and to do so as a prerequisite to whatever judicial review may be available. The CSRA provides for suits in district court in only a small handful of cases, principally in-

volving claims of discrimination unlawful under other federal statutes (most of which themselves require exhaustion of administrative remedies before filing suit). See pp. 4-8, *supra*. Petitioner himself acknowledges that the CSRA generally functions "as a jurisdiction-channeling statute," Pet. Br. 26 n.17 (emphasis deleted), directing that claims be considered by specified administrative bodies and expressly providing only limited judicial review, ordinarily in the courts of appeals. See *Fausto*, 484 U.S. at 449. As relevant here, the CSRA provides a "detailed structure," *Thunder Basin*, 510 U.S. at 207, for reviewing employee grievances through grievance procedures, binding arbitration, and appeal to the FLRA. 5 U.S.C. 7121(a) and (b), 7122(a)(1).

Petitioner errs in contending that "nothing in the overall structure of the CSRA imposes a requirement that employees exhaust negotiated grievance procedures." Pet. Br. 41. The statutory directive that the negotiated procedure be the "exclusive administrative procedure[]" for bargaining-unit employees to pursue their grievances, 5 U.S.C. 7121(a)(1), reflects Congress's judgment that the grievance and arbitration process is particularly well suited to address those claims, and it refutes the notion that Congress intended to permit employees to pursue their grievances in the first instance by other means nowhere mentioned in the Act. Cf. *Muniz*, 972 F.2d at 1309 (noting Congress's "unambiguous and unmistakable preference for exclusivity of arbitration"). Indeed, this Court has observed that "[p]erhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive." *McKart* v. *United States*, 395 U.S. 185, 193 (1969). Requiring presentment of complaints through one of the CSRA's remedial mechanisms, such as grievance and arbitration, also furthers Congress's intent to channel review of federal employment decisions to specified administrative bodies, in order to promote the development of "a unitary and

consistent Executive Branch position." *Fausto*, 484 U.S. at 449. Thus, the text and structure of the CSRA demonstrate that "Congress plainly did not want employees to take their grievances straight to court when they could have pursued the negotiated procedure instead." *Suzal* v. *Director, USIA*, 32 F.3d 574, 587 (D.C. Cir. 1994) (Williams, J., concurring); accord *Steadman*, 918 F.2d at 967-968.

Precluding such suits in district court also serves the "twin purposes" of the doctrine of exhaustion of administrative remedies: "protecting administrative agency authority and promoting judicial efficiency." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992). See generally *McKart*, 395 U.S. at 193-195. With respect to grievance and arbitration, the FAA and ultimately the FLRA, not the courts, "have primary responsibility for the programs that Congress has charged them to administer," *McCarthy*, 503 U.S. at 145, and the requirement that grievances be presented to them rests on "the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes * * * before it is haled into federal court," *ibid*. Preclusion of immediate review in district court also promotes judicial efficiency, because "[a] favorable agency decision * * * may moot" the claim. *Christian* v. *New York Dep't of Labor*, 414 U.S. 614, 622 (1974). And even when the administrative process does not resolve the controversy, it "may produce a useful record for subsequent judicial consideration." *McCarthy*, 503 U.S. at 145.

The foregoing principles "apply with particular force * * * when the agency proceedings * * * allow the agency to apply its special expertise." *McCarthy*, 503 U.S. at 145; *McKart*, 395 U.S. at 194. Here, channeling petitioner's complaint through the grievance process would have allowed the FAA, at the initial stage, to interpret 49 U.S.C. 45104(8) and its drug-testing plan, and draw on its expertise in administering the program. Proceeding to arbitration would have furthered

the CSRA's purpose of relying on that established method of resolving employment disputes and allowed the union to draw on its own experience in representing employees in the unit. And if the matter were not resolved in arbitration, the "plain language [of the CSRA] evinces an intent that the FLRA shall pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues." *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (per curiam); accord *ATF* v. *FLRA*, 464 U.S. 89, 97 (1983).

2. Contrary to the suggestions of amicus, see AFGE Br. 8, the constitutional nature of petitioner's grievance does not militate against channeling it through the statutorily-mandated grievance and arbitration procedure. Even if the ultimate resolution of constitutional claims traditionally has been the province of the courts, it does not follow that administrative bodies should not resolve cases in which constitutional claims are raised. "On the contrary, * * * the very fact that constitutional issues are put forward constitutes a strong reason" for requiring administrative review, *Aircraft Equip. Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); accord *Public Util. Comm.* v. *United States*, 355 U.S. 534, 539-540 (1958) (collecting authorities); 2 R. Pierce, Jr., *Administrative Law Treatise* § 15.5, at 1005 (4th ed. 2002), because the administrative process may eliminate the necessity of deciding constitutional questions by permitting an agency to resolve disputes on other grounds or in ways that avoid or minimize constitutional concerns. *E.g.*, *Ledford* v. *West*, 136 F.3d 776, 780-781 (Fed. Cir. 1998); *Meredith Corp.* v. *FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987). That course also gives the agency an opportunity to analyze the case and develop facts relevant to the claims, and thereby furnish a record for whatever judicial review may be available. *Meredith Corp.*, 809 F.2d at 872; accord *NTEU* v. *FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993).

Here, moreover, the CSRA grievance procedure in fact provides "meaningful review" of constitutional issues involved

in an employee's grievance. *Thunder Basin*, 510 U.S. at 207. The FLRA considers constitutional claims in reviewing arbitration awards (see p. 34, *supra*), and it is empowered to "take such action * * * as it considers necessary" if it determines that the award is deficient. 5 U.S.C. 7122(a). And as noted above, the FLRA could resolve a complaint such as petitioner's by applying 49 U.S.C. 45104(8), which subsumes constitutional standards.

3. Petitioner and his amicus are mistaken (Pet. Br. 1, 17, 18-19; NTEU Br. 5, 10, 26) that this Court's decision in *Von Raab*, demonstrates that district courts may afford judicial review to claims that are "nearly identical" to petitioner's. Pet. Br. 17. To begin with, "[t]he issue [the Court] confront[s] today simply was not presented" (*United States* v. *Booker*, 125 S. Ct. 738, 754 (2005)) in *Von Raab*, because the parties did not raise before this Court the issue of the district court's authority to review such claims in the first instance, and the Court's failure sua sponte to address implied preclusion of district court review under the CSRA does not reflect any judgment on that subject. More fundamentally, petitioner's constitutional claims are quite different from those raised in *Von Raab*. There, this Court upheld the Customs Service's program of non-random drug testing for employees against a union's facial challenge under the Fourth Amendment. 489 U.S. at 677; see J.A. 3-9, *Von Raab*, *supra* (No. 86-1879). The Court has sometimes allowed a broad programmatic challenge to be brought outside of the special statutory procedures Congress established to resolve individual claims. See, *e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494, 498 (1991); *Bowen* v. *Michigan Acad.*, 476 U.S. 667, 675-676 (1986).

Petitioner does not challenge the constitutionality of either the statute mandating testing of FAA employees in safety-sensitive positions (49 U.S.C. 45102(b)) or the FAA's program implementing that statute. He does not even dispute

that, by their terms, the FAA's procedures require random testing. See Pet. Br. 7-8. Rather, he alleges that the agency's *testing of him* violated both statutory and constitutional requirements, and he seeks relief *only with respect to himself*. See J.A. 11, 18-19. Petitioner's claim thus clearly is a "complaint * * * concerning a[] matter relating to [his] employment" and thus falls within the statutory definition of "grievance." 5 U.S.C. 7103(a)(9)(A). Accordingly, this case is wholly different from *Von Raab* and other cases presenting broad facial challenges, and is squarely within the scope of the CSRA's exclusive review provisions.

4. Petitioner errs in contending (Pet. Br. 41) that it would be inappropriate to preclude district court review and require resort to an administrative process when "the only administrative remedy is an informal grievance process." The statutorily mandated process under the CSRA/FAA system, while less formal than district-court litigation, establishes detailed procedures that provide for a prompt hearing, a right of representation, and a prompt written decision. *Pers. Mgmt. Sys.* Ch. III, ¶ 4(f). The negotiated grievance procedure under the CBA likewise provides for a right of representation, see J.A. 23, a reasonable amount of time to present the claim, a hearing, and prompt written resolution. J.A. 23-24. In any event, this Court has rejected the proposition that exhaustion is necessary only when procedures are formal, noting that even informal proceedings may "filter out" some claims and "foster better-prepared litigation once a dispute did move to the courtroom" by producing a useful record. *Booth* v. *Churner*, 532 U.S. 731, 737 (2001).

Petitioner likewise errs in arguing (Pet. Br. 43) that it "makes no sense" to require an employee to pursue administrative procedures when the union rather than the individual determines whether to pursue arbitration and review by the FLRA. That contention is fundamentally inconsistent with Congress's decision to rely on collective bargaining and the

familiar procedure of arbitration for resolving disputes involving employees covered by a CBA. Even pursuit of the grievance procedures alone (which is wholly within the power of the employee) advances valid interests in permitting an agency to correct its mistakes and resolving disputes efficiently before further proceedings are triggered. There is, moreover, nothing in the record to suggest that petitioner's union would have been anything less than vigorous in pressing a meritorious grievance through arbitration and the FLRA if necessary. Indeed, the union itself might be in a position to determine whether petitioner's experience reflected broader problems in the agency's implementation of random drug testing (and the union might have been able to approximate the relief petitioner sought by polling its members). And a union that fails to pursue a grievance risks an unfair labor practice charge for violation of its duty of fair representation. See *Karahalios*, 489 U.S. at 531-532.[18]

[18] Petitioner asserts (Br. 41, 44) that the issue of exhaustion is not before this Court because it was not passed on below and because the government purportedly forfeited the argument by not raising it below. As in *Thunder Basin*, however, the government's principal argument throughout this case has been that a suit directly in district court, bypassing the CSRA's comprehensive remedial scheme, is precluded.

Moreover, a respondent in this Court is "entitled * * * to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). The district court concluded that judicial review was barred in part because petitioner failed to exhaust administrative remedies. Pet. App. 14a & n.17. It was petitioner who then appealed, and circuit precedent squarely supported the preclusion of his district court suit raising both statutory and constitutional claims. It was not until his certiorari petition in this Court that petitioner first argued that the Constitution required an avenue for judicial review of constitutional claims. In response, we argued in our brief at the petition stage (at 23-26) that petitioner first was required to present his grievance in the administrative process. Petitioner did not argue in his reply brief at the petition stage that the government had forfeited any such argument, and he thereby forfeited that objection. Cf. Sup. Ct. R. 15.2. Furthermore, the parties have fully briefed the issue, and the question whether petitioner must present his grievance through

C. The CSRA Would Not Preclude Judicial Review Of A Constitutional Claim For Equitable Relief That Remained At The End Of The CSRA Review Process

Petitioner's failure to present his claim through the grievance procedures is a sufficient basis to affirm the judgment below, and thereby avoid definitive resolution of the difficult question of the proper judicial forum for such claims. In our view, however, the presumption in favor of judicial review would ensure a forum for properly exhausted constitutional claims.

1. Mindful of the "respective costs and benefits" of federal personnel related litigation, *Bush*, 462 U.S. at 388, Congress created a remedial scheme that focused on the practical effects of various actions on workers, and provided more elaborate procedural protections for actions with particularly serious consequences. *E.g.*, *Pinar*, 747 F.2d at 907. Congress afforded considerable protections to employees who are subject to a "major adverse action" or to a "personnel action" on prohibited grounds, and defined both of those terms quite broadly to encompass all of what it regarded as actions and injuries sufficiently concrete and serious to warrant specific safeguards. The formal administrative and judicial review Congress afforded under the CSRA furnishes considerably more protection to employees than the previous scheme. See S. Rep. No. 969, at 46; see also *Leefer* v. *Administrator, NASA*, 543 F.2d 209, 210 n.4 (D.C. Cir. 1976) (noting that employees were not eligible even for administrative review for suspensions of 30 days or less). The CSRA reflects Congress's categorical judgment, after nearly a century of experience in providing protection to civil-service employees, that occurrences that do not constitute "major adverse actions" or

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the CSRA's comprehensive remedial scheme is "a 'predicate to an intelligent resolution' of" whether the CSRA precludes review of constitutional claims. *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005).

"personnel actions" generally do not require a formal legal process that includes judicial review.

Congress legitimately could conclude that the standards and remedies explicitly provided by the CSRA would ordinarily be adequate, and that other personnel matters are not likely to merit judicial, as opposed to administrative, review. That judgment is entitled to respect by the courts, in light of "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'" such as employment. *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974) (quoting *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961)); accord *Cornelius* v. *NAACP Legal Def. Fund, Inc.*, 473 U.S. 788, 805 (1985); *Walters* v. *Radiation Survivors*, 473 U.S. 305, 319-320 (1985); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

Minor disputes arising out of the day-to-day frustrations and frictions of the workplace—over such things as individual work assignments, offhand comments, work-station location —even if allegedly based on unconstitutional motives or framed in terms of due process or property rights, ordinarily do not rise to the level of a violation of constitutional or legal rights, and do not warrant review by federal courts. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787-788 (1998) (noting that Title VII does not apply to "the ordinary tribulations of the workplace, such as the sporadic use of abusive language"). The federal workplace could not function if such minor events routinely became the subject of constitutional adjudication. Particularly in the context of equitable actions of the sort at issue here, there is a long tradition of "withholding * * * relief" in cases of limited import, in "recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer." *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 350-351 (1951); accord *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716-718 (1996).

2. It remains possible, however, that an action could be taken by an agency with respect to one of its employees that would be outside of the definition of "major adverse action" or "personnel action" and yet rise to the level of constitutional significance. See *Bush*, 462 U.S. at 385 n.28 ("certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme"). A claim concerning drug testing could rise to that level. If a claim concerning such an action were not satisfactorily resolved through the CSRA's administrative processes, and if judicial review were not otherwise available through the CSRA's comprehensive scheme, the structure of the CSRA would not be a sufficient basis to overcome the presumption in favor of judicial review of constitutional claims.

This Court has stated that a "'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Michigan Acad.*, 476 U.S. at 681 n.12). "[I]n part to avoid * * * [such] question[s]," *ibid.*, this Court has adopted a strong presumption against construing statutes to preclude all judicial review of such claims. While the Court will find Congress has foreclosed judicial review of statutory claims if that intent is "fairly discernible" by implication from the statutory structure and language, *Fausto*, 484 U.S. at 452, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster*, 486 U.S. at 603); accord *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) (stating that Congress's intent must be "manifested by 'clear and convincing evidence'").

The language of the CSRA does not appear to meet the "heightened showing," *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims. While the CSRA's preclusion of judicial review of statutory grievance

claims is "fairly discernable" (*Fausto*, 484 U.S. at 452), the CSRA does not, with the requisite clarity, foreclose judicial review of the limited class of constitutional claims that are not resolved through the administrative process.[19]

3. Although the presumption in favor of judicial review of constitutional claims would appear to ensure a judicial forum, the question of which forum—district court or court of appeals—is more difficult. The structure of the CSRA strongly favors review in the courts of appeals. This Court, moreover, has recognized and applied in the federal employment context a presumption in favor of appellate court review for similar claims. *Lindahl*, 470 U.S. at 797. The language of the applicable judicial review provision, however, does not easily accommodate appeals, presumably because Congress did not avert to this problem directly. Section 7123 includes language that permits "[a]ny person aggrieved by any final order of the [FLRA]" to seek judicial review in either the D.C. Circuit or a regional court of appeals. 5 U.S.C. 7123(a)(1). However, Section 7123(a)(1) goes on to except from that authorization FLRA orders "involving an award by an arbitrator" (other than orders involving an unfair labor practice under 5 U.S.C. 7118). That language would appear to exclude arbitrated claims, even when they involve constitutional claims. The presumption in favor of judicial review of constitutional claims, however, may be sufficiently strong to support reading in a limit to the exception for constitutional claims. Cf. *U.S. Dep't of the Treasury* v. *FLRA*, 43 F.3d 682, 689 & n.9 (D.C. Cir. 1995) (construing Section 7123 not to bar review by court of appeals of certain FLRA decisions involv-

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[19] Compare *Demore*, 538 U.S. at 516-517 (holding that statute providing that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review," and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien," did not bar an alien's constitutional challenge to "the statutory framework that permits his detention without bail").

ing arbitration, including where constitutional issue was decided by FLRA); contra *NTEU* v. *FLRA*, 112 F.3d 402, 405 (9th Cir. 1997) (disagreeing with *Treasury* v. *FLRA* that Section 7123 preserved judicial review of statutory issue); cf. *Griffith* v. *FLRA*, 842 F.2d 487, 494-495 (D.C. Cir. 1988) (although 5 U.S.C. 7122 and 7123 precluded judicial review of statutory claims, CSRA did not preclude district court challenge to FLRA decision on procedural due process grounds).

The alternative of allowing district court review of such claims is perhaps more straightforward, but it is difficult to reconcile with the structure of the CSRA or the presumption in favor of appellate review of agency action recognized in *Lindahl*, 470 U.S. at 797. As this Court has recognized, one of Congress's principal goals in enacting the CSRA was to address "dissatisfaction" with district court review of federal employment claims, which resulted both in "wide variations in the kinds of decisions . . . issued on the same or similar matters" and "wasteful and irrational" duplicative judicial review by both the district court and the court of appeals. *Fausto*, 484 U.S. at 445. For that reason, Congress centralized judicial review of most major adverse actions and prohibited personnel practice claims in the Federal Circuit, and provided for review of FLRA decisions in other courts of appeals, 5 U.S.C. 7123(b). This Court has consistently resisted constructions of the CSRA that would add "an 'unnecessary layer of judicial review' in lower federal courts," or undermine Congress's efforts to "[e]ncourage[] more consistent judicial decisions" by centralizing review in the courts of appeals. *Fausto*, 484 U.S. at 449; accord *Lindahl*, 470 U.S. at 797. Although it is a close question, a reading of Section 7123 that allows judicial review in the court of appeals is more consistent with the structure of the CSRA.[20]

[20] Even if petitioner were correct that constitutional challenges such as his should be heard in district court, that review should be limited to the agency record rather than de novo. "[T]he focal point for judicial review should be the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam)).

APPENDIX

1. Title 5 U.S.C. of the United States Codes provides in pertinent part:

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel

systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court

the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction

of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

2. Human Resource Management, FAA, *FAA Personnel Management System—Introduction* (visited Oct. 11, 2005) <http://faa.gov/ahr/policy/pms/pmsintro. htm> provides in pertinent part:

* * * * *

VII. MERIT PRINCIPLES

The FAA personnel management system shall be implemented consistent with the following merit system principles:

• (a) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society; selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition, which assures that all receive equal opportunity.

• (b) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, sexual orientation, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

• (c) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector; appropriate incentives and recognition should be provided for excellence in performance.

• (d) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

• (e) The Federal workforce should be used efficiently and effectively.

• (f) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

• (g) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

• (h) Employees should be:

o(i) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes; and

o (ii) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

• (i) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:

o (i) a violation of any law, rule, or regulation; or

o (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

VIII. PROHIBITED PERSONNEL PRACTICES

• (a) Any FAA employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority:

o (i) discriminate for or against any employee or applicant for employment, on the basis of:

- race, color, religion. sex, or national origin, as prohibited under Section 717 of the Civil Rights Acts of 1964 (42 U.S.C. 2000e-16);

- age, as prohibited under Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

- sex, as prohibited under Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d));

- handicapping condition, as prohibited under Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

- marital status, sexual orientation, or political affiliation, as prohibited under any law, rule, or regulation;

o (ii) coerce the political activity of any person (including the providing of any political contribution or service) or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

o (iii) deceive or willfully obstruct any person to withdraw with respect to such person's right to compete for employment;

o (iv) influence any person to withdrawal from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

- (v) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

- (vi) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:

  - any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement, a gross waste of funds, an abuse of authority; or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

  - any disclosure to the Special Counsel or to the Inspector General of an agency, or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

- (vii) to take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of:

  - the exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation;

  - testifying for or otherwise lawfully assisting of any individual in the exercise of any right referred to in subparagraph VIII (a);

  - cooperating with or disclosing information to the Inspector General of any agency, or the Special Counsel, in accordance with applicable provision of the law; or

  - for refusing to obey an order that would require the individual to violate a law;

- (viii) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account, in determining suitability or fitness, any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or the United States; or

- (ix) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation, implementing or

directly concerning, the merit system principles contained in this paragraph.

• (b) Paragraph VIII (a) shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

○ (i) The head of each line of business or staff organization shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of a line of business or staff organization delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

○ (ii) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to employee or applicant for employment in the civil service under:

■ Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

■ Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

- Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d)), prohibiting discrimination on the basis of sex;

- Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

- the provision of any law, rule, or regulation prohibiting discrimination on the basis of marital status, sexual orientation, or political affiliation.

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1131

TERRY L. WHITMAN, PETITIONER *v.* DEPARTMENT OF TRANSPORTATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 5, 2006]

PER CURIAM.

Terry Whitman, the petitioner, is an employee of the Federal Aviation Administration (FAA) and is subject to the agency's drug and alcohol testing program. Without first seeking to pursue grievance procedures under his collective-bargaining agreement, he filed suit in the United States District Court for the District of Alaska, alleging the FAA tested him in a nonrandom manner, in violation of his constitutional rights and 49 U. S. C. §45104(8).

The FAA has its own procedural framework for the resolution of claims by its employees; and for this purpose it adopts certain sections of the Civil Service Reform Act of 1978 (CSRA), including Chapter 71 of Title 5, which sets forth the rules for grievances. 49 U. S. C. §40122(g)(2)(C). The District Court held that, under the provisions of the CSRA, it was without jurisdiction to consider the petitioner's claims. The Court of Appeals for the Ninth Circuit affirmed, stating that because "5 U. S. C. §7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by

the negotiated grievance procedures of federal employees' collective bargaining agreements," his claims are precluded. 382 F. 3d 938, 939 (2004). This Court granted certiorari to review the judgment. 545 U. S. ___ (2005).

The Court of Appeals was correct to say that 5 U. S. C. §7121(a)(1) does not confer jurisdiction. Another statute, however—a very familiar one—grants jurisdiction to the federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. §1331. The question, then, is not whether 5 U. S. C. §7121 confers jurisdiction, but whether §7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts, see *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642 (2002) (holding that "even if [47 U. S. C.] §252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. §1331 to review the Commission's order for compliance with federal law"), or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA, cf. *United States* v. *Fausto*, 484 U. S. 439, 443–444 (1988); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) ("The question is phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

In deciding the question of jurisdiction and preclusion, the Court would be required first to ascertain where Whitman's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. It may be, for example, that the FAA's actions, as described by the petitioner, constitute a "prohibited personnel practice." See 5 U. S. C. §2302(b); 49 U. S. C. §40122(g)(2)(A). Both the petitioner and the Government say they do not, but because the ultimate question may be jurisdictional, this concession ought not

to be accepted out of hand. See *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U. S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so"). The Court of Appeals did not decide whether the petitioner's allegations state a "prohibited personnel practice." The proper course, then, is to remand for the Court of Appeals to address the matter, see *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999), as well as the ultimate issue of preclusion. The various other issues raised before this Court, but not decided below, may also be addressed on remand, including: whether the petitioner has challenged final agency action; whether the petitioner has exhausted his administrative remedies; whether exhaustion is required given this statutory scheme and the Administrative Procedure Act, as interpreted in *Darby* v. *Cisneros*, 509 U. S. 137 (1993); and whether the Government has forfeited its exhaustion-of-remedies argument. It may be that a decision on these questions can obviate the need to decide a more difficult question of preclusion.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.